APPEAL NO. 010451

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on February 2, 2001. This was a claim for death benefits; the deceased had sustained a back injury, with psychological sequelae, in _____, and was prescribed methadone as part of her pain control. The claim for death benefits stemmed from an alleged new back injury on _____, which lead to the deceased's hospitalization and then death from a methadone overdose. The appellant's (beneficiary) attorney specifically disclaimed that a new mental trauma injury was being asserted. The hearing officer held that the deceased had a preexisting back pain condition from her _____ injury which had not resolved, and there was no new back injury. Therefore, although the deceased died from medical treatment for back pain, the hearing officer held that the respondent (carrier) at the time of the _____, injury was not liable for death benefits.

The attorney for the beneficiary has appealed. He asserts that the evidence proves a new back injury through aggravation, leading to an increase in medication. The carrier recites evidence in favor of the decision.

DECISION

We affirm the hearing officer's decision.

A brief summary of facts to supplement that of the hearing officer will be given here. The deceased worked for (employer) when she hurt her back on _____. The carrier, or adjusting firm, was (prior carrier). Dr. M began treating the deceased for chronic pain on May 28, 1997. His initial report noted that the deceased had an MRI showing minimal bulges at two levels and some degenerative disease, but that she continued to complain of pain. The deceased had begun treatment in December 1996 for depression. Her treating psychiatrist was Dr. J, who was treating her in 1998 in coordination with Dr. M. Dr. J prescribed Xanax for the deceased's depression.

On October 28, 1998, Dr. M filed a Report of Medical Evaluation (TWCC-69) certifying that the deceased was at maximum medical improvement as of the end of September with a 10% impairment rating. At this time, the medications noted in the narrative report included 10 mg of methadone three times a day for the deceased's pain. She was released back to work with a 10-pound lifting limit and no driving. Dr. J recorded in his late November 1998 report that the deceased was looking forward to returning to work and felt like she had support at the workplace. She resumed work for the employer on a not-quite-full-time basis.

A note from Dr. M to the adjuster on February 24, 1999, noted that the deceased's methadone dosage had been increased. He said that she would be maintained on this indefinitely because it assured maximum functional capacity. The deceased continued to be treated for her back, and had a pain injection in the hospital on June 23, 1999.

On _____, an incident occurred about which there was conflicting evidence. According to the beneficiary, the deceased told him that evening that she had been shoved by a coworker, Ms. M, with whom she had had an earlier disagreement, and that she was very agitated and in pain. The deceased's supervisor, Ms. B, gave a statement in mid-July 1999 which acknowledged that the deceased and Ms. M had some disagreement about a missing table check, and that the deceased told Ms. B that she was "bumped" by Ms. M but it was no big deal. A statement from Ms. M denies any contact at all.

As the deceased's agitation increased to suicidal ideation on the night of July 4, the beneficiary called Dr. J, who recommended inpatient hospitalization at a psychiatric facility. The deceased was admitted on July 5. Dr. J's admission report recorded the deceased's complaints of general harassment from coworkers at work that had occurred increasingly over a period of time. The deceased also reported an incident on July 4 of being late to work, but no shoving incident is recorded. Dr. J noted in this report that the deceased was currently taking 40 mg of methadone daily. In this report, under "past History," Dr. J refers to a thick file in his office of past outpatient history for the deceased and notes "nothing has changed." Over the next two days, Dr. J noted that the deceased's methadone was decreased to 20 mg per day, and that she was taking other medications, as well as undergoing individual and group psychotherapy. Dr. J specifically noted that there was a linkage between the deceased's anxiety level and pain level. He stated that the dosage of methadone might be increased back to 40 mg but that they would try to keep it at 20 mg. On July 8, Dr. J noted that the deceased had been very sedated that morning and had been hard to rouse. The deceased contended that she had been given the wrong medication the night before and Dr. J said that this was being investigated.

The last report is a seven-page report dated July 9, the date that the deceased was to have been discharged. Dr. J noted that the deceased had spoken with her husband the night before in anticipation of leaving. Her suicidal ideation had resolved and she had made good progress. Dr. J noted that the deceased complained of her pain and the fact that Dr. J was giving her less methadone, so he increased the dosage to 30 mg. (Dr. J noted that the decrease was done in coordination with Dr. M.) The claimant did not take the antidepressant Serzone all day on July 8, because it had given her problems in the previous days. However, at 9:00 that morning, the deceased could not be roused at all and an ambulance was called. The deceased died that morning. Dr. J's report thus incorporates that event as well as what went before. According to a coroner's report, the cause of death was acute methadone intoxication brought on by an overdose. The test results showed a blood level of 0.44 mg/L. The deceased weighed 133 pounds. None of the evidence indicated that the overdose was intentional.

The record indicates that the beneficiary contacted the prior carrier who informed him that it was their position that a new injury had occurred. The beneficiary filed a claim for death benefits against the carrier in this case. Thus, the prior carrier was not a party to this dispute. At the CCH, the beneficiary's attorney disclaimed that his position was that a new or enhanced psychological injury had occurred, and that he believed such injuries would not be compensable under the 1989 Act. The beneficiary's articulated theory of

recovery was that the deceased's death occurred due to medication for a new back injury that happened on _____.

Finally, we observe that one of the beneficiary's exhibits is a report that Dr. J dictated on July 28, 1999, purporting to be a note from _____, detailing an episode in which the deceased had been threatened by Ms. M at work who then pushed her, twisting her back. This report ends with the note that the reinjury to the back will have to be looked at during the hospitalization. The report records the wrong name for the deceased, and noted that Dr. J talked to her and her husband. The report of this conversation, dictated on July 6, 1999, stated that it had been the beneficiary who called, and, as we noted before, does not mention the same history of what occurred at the restaurant.

The hearing officer was correct in her assessment that the threshold issue was whether the deceased had a new injury (including an aggravated injury) to her back or experienced a continuation of her previous condition. We cannot agree that the hearing officer erred by finding that the deceased had continuing back pain and that there was no new back injury on _____, necessitating treatment by methadone. Plainly, the deceased was already on methadone when admitted to the psychiatric facility. Her dosage was temporarily decreased in that facility, apparently due to other medications, and was restored closer to her pre-admission level at the time of her death. No specific incident involving her back was mentioned by the deceased to Dr. J. Dr. J linked her pain level to her anxiety more than to any new back injury.

The hearing officer is the sole judge of the relevance, materiality, weight, and credibility of the evidence presented at the hearing. Section 410.165(a). The decision should not be set aside because different inferences and conclusions may be drawn upon review, even when the record contains evidence that would lend itself to different inferences. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ). The trier of fact may believe all, part, or none of the testimony of any witness. Taylor v. Lewis, 553 S.W.2d 153, 161 (Tex. Civ. App.-Amarillo 1977, writ ref'd n.r.e.). An appeals-level body is not a fact finder and does not normally pass upon the credibility of witnesses or substitute its own judgment for that of the trier of fact, even if the evidence would support a different result. National Union Fire Insurance Company of Pittsburgh, Pennsylvania v. Soto, 819 S.W.2d 619, 620 (Tex. App.-El Paso 1991, writ denied); American Motorists Insurance Co. v. Volentine, 867 S.W.2d 170 (Tex. App.-Beaumont 1993, no writ).

The decision of the hearing officer will be set aside only if the evidence supporting the hearing officer's determination is so weak or against the overwhelming weight of the evidence as to be clearly wrong or manifestly unjust. Atlantic Mutual Insurance Company v. Middleman, 661 S.W.2d 182 (Tex. App.-San Antonio 1983, writ ref'd n.r.e.). The death of the deceased is tragic and, as the hearing officer noted, stemmed from medication she was taking for her back injury. However, the deceased was prescribed this medication due to her _____ back injury and its continuing

effects, one of which was pain enough to require an injection on June 23, 1999. The hearing officer could well believe that an incident had occurred as stated but that no physical injury resulted and that the medical treatment administered to the deceased was for her _____ injury, not for any new _____ injury. The hearing officer's discussion sets forth her reasoning and is sufficiently supported by the record. We therefore affirm her decision and order.

Susan M. Kelley
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Gary L. Kilgore
Appeals Judge